Miccosukee Tribe of Indians
of Florida

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December 9, 2020

Jeaneanne Gettle
Director, Water Division
EPA, Region 4
61 Forsyth Street, SW #9
Atlanta, GA 30303

Re: State of Florida Assumption of 404 Permitting – Comments of the Miccosukee Tribe of Indians of Florida

Dear Ms. Gettle;

The Miccosukee Tribe of Indians of Florida ("Tribe"), exercising powers of self-governance under a Tribal constitution approved by the Secretary of Interior, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C.§ 476, is a federally-recognized and federally-protected Indian Tribe, whose members live and work within the Florida Everglades, whose land interests lie within the Florida Everglades, and whose cultural identity and way of life is dependent upon the natural Everglades. The entire way of life of the Tribe and its members, including their cultural, religious, economic, and historical identity, is based upon the Everglades and upon the preservation of the Everglades in its natural state. The Tribe and its members rely upon the Everglades in its natural state to support both subsistence and commercial activities. Subsistence activities include gathering of materials, hunting, and fishing within the Everglades. Commercial activities including frogging, airboat and other guided tours, and recreational and tourism facilities within the Everglades. The State of Florida's Assumption of 404 Permitting on the Florida Everglades is of paramount concern to the Miccosukee Tribe. Accordingly, we provide these comments for consideration and implementation by the Environmental Protection Agency and the State of Florida.

TRIBAL RIGHTS:

The Tribe has traditional, aboriginal, and statutory rights to use and occupy the greater Everglades, Big Cypress National Preserve, Everglades National Park and Water Conservation 3A, in additional to its existing reservation properties. Among these are the right of occupation, subsistence and traditional and cultural uses. The Tribe has significant culturally sensitive sites within these areas which are protected under the Native American Graves Protection and Repatriation Act (NAGPRA). The protection of these enumerated rights and the lands of the Tribe are ensured by the trust responsibility of the Federal Government to all tribal nations.

The Tribe's land interests and its natural resources (including its land, the flora and fauna living thereon, and the water flowing thereupon) lie within the Everglades. These interests include: (i) the Tribe's federal Indian Reservation; (ii) codified rights within the Enabling Acts of both Everglades National Park, (Pub. L. 105-313 – Oct. 30, 1998), and Big Cypress National Preserve, (16 USC §698j, Pub. L. 93-440 – Oct. 11, 1974); (iii) the Tribe's perpetual lease in WCA-3A, commonly referred to as the Leased Lands, (guaranteeing access, occupancy, and use in perpetuity under the terms of the Miccosukee Land Claims Settlement Act), 25 USC §1741; and (iv) the Tribe's permit for use and occupancy of an area along the northern boundary of ENP, known as the Miccosukee Reserved Area, Pub.L. 105-313 (Oct. 30, 1998). The preservation of these interests are dependent upon the land remaining in its natural state and condition, these areas sustain a unique balance of flora and fauna, dependent upon the natural flow of unpolluted water, which creates and supports the Miccosukee way of life. The alteration of the natural state of the Everglades and its permanent destruction as a unique natural ecosystem, including imbalances in reduction of native species, due to degradation of the natural aquatic flora and fauna, seriously threatens the Tribe's entire way of life, its traditional bases of subsistence, its commercial activities, and its natural resources. The Environmental Protection Agency (EPA), and the Army Corps of Engineers (USACOE), as federal partners to the Miccosukee Tribe, must assure that the State of Florida's assumption of 404 permitting does not adversely impact or abrogate those rights.

INDIAN COUNTRY:

Indian Country is defined in 18 USC §1151 as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Accordingly, the Miccosukee maintain and assert that Everglades National Park, Big Cypress National Preserve, the Leased lands in WCA 3A, along with Miccosukee trust lands are indeed

Indian Country as defined in 18 USC §1151 and should not be subject to 404 assumption by the State of Florida.

As enumerated herein, the Miccosukee of plenary rights within Big Cypress National Preserve, Everglades National Park and the Leased Lands. One of those primary rights is the right to occupy. The Miccosukee have exercised this right for hundreds of years. The Miccosukee have traditional Indian Camps throughout Big Cypress National Preserve, the Leased Lands and Everglades National Park. In fact, the primary residence and governmental seat is located on the northern boundary of Everglades National Park known as the Miccosukee Reserved Area. As provided in subsection (b) of 18 USC §1151, the presence of these dependent traditional Indian camps, the Miccosukee community and the governmental complex mandate that the lands where these camps and communities are located are defined as Indian Country and should fall outside of the 404 assumption by the State of Florida.

FDEP LACKS RESOURCES TO IMPLEMENT, OPERATE AND ENFORCE A STATE 404 PROGRAM:

The Miccosukee are concerned with the ability of the Florida Department of Environmental Protection (FDEP), to implement the proposed 404 program due to a lack of resources. FDEP has undergone dramatic cuts to staffing, reductions in expertise and inadequate enforcement of existing environmental mandates, particularly in recent years. Because of the adverse effect COVID-19 has had on local, state and federal governments, large shortfalls in budget expectations for the state may further impact DEP and their 404 program.

When FDEP personnel decided to undertake the 404 permitting program they claimed that no additional resources would be required to adopt, implement, operate and enforce a state Section 404 program. FDEP gave this assurance to the Florida legislature when legislators authorized DEP to explore the possibility of seeking assumption. FDEP's position has continued even in the face of our state's major budget shortfalls due to COVID and a downturn in the economy. FDEP's position is unrealistic, and only raises additional concerns about FDEP's inability to operate this program. The only two states to have assumed 404 jurisdiction spent millions of dollars to get their programs started and yearly thereafter to operate.

FDEP staff would need adequate training (which also costs money) because the 404 permitting program is not the same as Florida's ERP Program. FDEP's insistence that there

is "80% overlap" fails to recognize that these are distinct programs, with different standards and objectives, and that staff would have to consider and process ERP and 404 permits differently. This is especially true as it relates to the impacts of proposed projects on listed species.

EPA must carefully consider not only the adequacy of Florida's authority to administer the CWA § 404 program, 40 C.F.R. § 233.1(a), but also the funding and resources available for program administration and estimated workload to determine its ability to administer the program, 40 C.F.R. § 233.11. FDEP's claims that it can simply fold a 404 program into its existing ERP program, and rely on staff and resources allocated by the legislature as necessary to operate only the ERP program, must be rejected.

LOSS OF VITAL FEDERAL REVIEW AND PROTECTIONS

With Florida's critically-important wetlands and endangered species, two levels of review are essential to protect our resources from local political pressure and special interests, particularly in light of fast population growth and development. Federal action triggers a myriad of other federal protections, including the Endangered Species Act (ESA) that protect the rarest and most at-risk wildlife in our state, the Magnuson-Stevens Act that protects Essential Fish Habitat and our world-class fisheries, the National Environmental Policy Act (NEPA) that protects our quality of life and helps ensure good decision making, and the National Historic Preservation Act (NHPA) that protects our history and cultural resources. The state of Florida has no substitute for these federal laws.

In the past, public participation through NEPA and the Corps' permitting authority have informed, modified and/or halted projects that were authorized by FDEP but would have been detrimental to Florida.

Moreover, Florida has severely limited access to the courts and the ability of the Miccosukee to challenge unlawful permits in an independent forum. This creates an additional lack of oversight and accountability that would further undermine public confidence in a state 404 program and the ability of those affected to hold FDEP accountable when the state falls short.

It is imperative that EPA deny this application unless and until the state adopts the same protections as NEPA, ESA and NHPA, and judicial mechanisms that ensure accountability.

ENDANGERED SPECIES WILL BE ADVERSELY IMPACTED

The CWA's and ESA's mandate to ensure no listed species will be jeopardized by a state's assumption of the 404 program and a state's approval of permits at the project level has been one of the largest challenges for states considering assumption. And rightly so, as protection of listed species is central to these federal laws and their continued existence is an integral part of Miccosukee tradition and cultural identity.

Florida has more than 130 listed species, more than 7,700 lakes (greater than 10 acres), 33 first-magnitude springs, 11 million acres of wetlands, almost 1,200 miles of coastline, and approximately 27,561 linear miles of rivers and streams. Rather than prioritize the protection of species, however, Florida proposed an unprecedented approach that places our listed species in grave danger. Instead of evaluating impacts and potential jeopardy to listed species at the project-specific permit level, FDEP proposed that the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) engage in a one-time programmatic consultation that would only identify procedural requirements for state permit processors to use to determine whether there will be jeopardy to listed species. While we agree that EPA must perform a S. 7 consultation on its decision to approve or disapprove a state's or tribe's assumption of the program, the Miccosukee are concerned that a programmatic consultation, especially as proposed by FDEP, will not be adequate to protect listed species in the state. The protection of all species found in the Florida Everglades is of paramount concern to the Miccosukee. The Tribe believes that Florida's plan is an inadequate substitute for the federal expertise that has been developed over the years, particularly in a state that has let go of its own experts, reduced its staffing, and claimed that no additional resources would be needed for this purpose.

The sheer number of listed species in Florida creates a wide array of circumstances necessary for permit review that a truncated consultation's blanket authority cannot adequately cover. With Florida's vast waterways creating further complexities, ESA Section 7 consultation in Florida will require comprehensive analysis of many projects across the state to determine their potential impacts on many listed species and down stream users, such as the Tribe.

Under a programmatic consultation, EPA must review Florida's proposed criteria and process for ensuring state issued permits will not cause jeopardy to listed species. More importantly, EPA may only approve Florida's program if it determines the program fulfills this requirement while taking into account comments from the Services and the Corps. (40 C.F.R. § 233.15(g)). The Miccosukee request that EPA require programmatic and permit-

specific government-to-government consultation to ensure protection of species and deny Florida's application until these conditions are met.

FDEP'S PROPOSED PROGRAMMATIC AGREEMENT FAILS TO PROTECT CULTURAL AND NATURAL RESOURCES

The Miccosukee Tribe participated in government-to-government consultation for the subject process on December 3, 2020. The Miccosukee Tribe affirmatively declines to join as a party to the drafted Programmatic Agreement (PA), and strongly objects to the process of grouping Native American Tribes as a way to fast track the process. The PA falls far short of appropriately determining a process that effectively protects irreplaceable cultural and natural resources. The EPA and other Federal Agencies have a trust responsibility through a myriad of Federal regulations including Section 106 consultation and NAGPRA. Florida Department of Environmental Protection is legally limited in assuming these responsibilities, and the PA does not adequately describe a parallel process. This trust responsibility cannot be delegated to the state without the Miccosukee Tribe's approval and the Miccosukee Tribe does not give approval for the EPA to neglect these responsibilities. The process of assumption as described in the PA drastically removes existing legal protections for sacred and culturally significant sites. The 120-Day review by EPA should be extended until such protections can be afforded through the development of appropriate procedures.

Based on the foregoing the Miccosukee Tribe requests that EPA should either deny the State of Florida's application for 404 assumption or extend the review process to allow for these concerns and identified shortfalls in the proposed program to be addressed.

Should you have any questions, or concerns, please contact Kevin Donaldson or Jeanine Bennett, Esq., of my staff at 305-223-8380. Thank you for your attention to this matter.

Sincerely,

Billy Cypress,
Tribal Chairman

cc: Miccosukee Business Council
Jeanine Bennett, In-House Legal Counsel
Kevin Donaldson, Director of Real Estate Services, NAGPRA Section 106 Representative
Gene Duncan, Director of Water Resources
Craig van der Heiden, Director of Fish and Wildlife